Supreme Court, U.S.
FILED
JUL 9 2003
OFFICE OF THE CLERK

(3)

No. 02-1474

IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

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July 9, 2003

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QUESTION PRESENTED

Whether, under 47 U.S.C. § 224, the process for determining and paying the marginal cost of attaching cables to utility poles, plus the portion of the fully allocated cost of the construction and operation of the poles based on the space occupied by the attached cables, meets or exceeds any constitutional requirement that "just compensation" be paid to utility pole owners for mandatory attachments.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the parties appearing before the United States Court of Appeals for the Eleventh Circuit were as follows: the Alabama Cable Telecommunications Association, Comcast Cablevision of Dothan, Inc., Cox Communications Gulf Coast, L.L.C., and the Florida Cable Telecommunications Association, Inc., intervening in support of the Federal Respondents. American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Gulf Power Company, and PECO Energy Company intervened in support of Petitioner.

This Brief in Opposition is submitted by the Alabama Cable Telecommunications Association and Comcast Cablevision of Alabama, Inc. (the successor to Comcast Cablevision of Dothan, Inc.) ("Respondent Intervenors").

The Alabama Cable Telecommunications Association is the principal trade association of the cable television industry in Alabama. ACTA has no parent corporations or publicly held companies owning 10% or more of its stock whose listing is required by Supreme Court Rule 29.6.

Comcast Cablevision of Dothan, Inc. has been merged into Comcast Cablevision of Alabama, Inc., an Alabama corporation, which is 100% owned by Comcast Cable Communications, Inc., a Delaware corporation, which is 100% owned by Comcast Holdings Corporation, a Pennsylvania corporation, which is 100% owned by Comcast Corporation, a publicly-held Pennsylvania corporation.

In the proceeding below, the Florida Cable Telecommunications Association, Inc. and Cox

Communications Gulf Coast, L.L.C. intervened in a Petition for Review filed by Gulf Power Company (11th Cir Case No. 00-15068-D, filed Sept. 27, 2000). Gulf Power Company's Petition for Review sought review of *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Order, 15 F.C.C.R. 17346 (2000), the same decision which Petitioner Alabama Power Company, Inc., is seeking further review of here. Gulf Power was neither a party to nor a participant in the proceedings that led to the Order. The court of appeals dismissed Gulf Power Company's Petition for Review for lack of standing, because the utility was not a party to the agency proceeding under review. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366-67 (11th Cir. 2002), Petitioner's Appendix ("Pet. App.") at 13a-14a. That dismissal has not been presented by Petitioner to this Court for review.

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RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

Respondent Intervenors Alabama Cable Telecommunications Association and Comcast Cablevision of Alabama, Inc., ("Cable Respondents") respectfully request that this Court deny the petition for a writ of certiorari requested by Petitioner Alabama Power Company, Inc. ("Petitioner" or "APCO") to review the decision of the United States Court of Appeals for the Eleventh Circuit.

COUNTERSTATEMENT OF THE CASE

This case presents the issue of whether the process by which Respondent Federal Communications Commission ("FCC" or "Commission") determines and calculates pole rental and other payments pursuant to the Pole Attachments Act of 1978, 47 U.S.C. § 224, (the "Act")

provides "just compensation" to utility pole owners that must allow cable operators to attach their facilities to utility poles. The Eleventh Circuit, in affirming a decision of the FCC, properly found that payment of all of the costs incurred by Petitioner for accommodating cable television operators' attachments to Petitioner's poles provides "just compensation." Moreover, as the Eleventh Circuit observed, even though this cost reimbursement alone is constitutionally sufficient, under the terms of the Act and the FCC's regulations, Petitioner receives additional and substantial annual pole rental payments from the cable television operators who have attached to Petitioner's utility poles, thus guaranteeing that the payments to Petitioner well exceed any just compensation owed. Pet. App. 21a.

Petitioner's attack on the Act's formula and the FCC's resolution of pole attachment complaints is yet another chapter in the story of the electric utility industry's efforts over more than two decades to undermine the statutory and regulatory provisions in § 224 that ensure "just and reasonable" "rates, terms, and conditions" for entities such as cable television operators who must attach their facilities to essential, "bottleneck" utility poles. *See National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330-331 (2002) ("*NCTA*"); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("*Florida Power*"). Prior to 1996, cable operators facing unreasonable rates, terms, or conditions for attaching their facilities to utility poles filed complaints at the FCC that were resolved pursuant to the provisions in § 224 and the FCC's implementing regulations. The utilities' constitutional challenge to the FCC's jurisdiction and pole rental formula was rejected because there was no "taking" and the pole rental formula was reasonable. *Florida Power*, 480 U.S. at 254.

Subsequent to the enactment of the Telecommunications Act of 1996, which among other

things added a provision in § 224(f) requiring utility pole owners to grant cable operators and certain telecommunications carriers access to poles, the utilities again challenged the formula and regulations of the FCC as facially unconstitutional for these "new" mandatory attachments. Although the district court found that the mandatory access provisions in § 224(f) caused a "taking," it also found that the process for determining pole rental and other payments under the formulas prescribed in § 224 and FCC regulations (previously upheld in *Florida Power* for "voluntary" attachments) nonetheless satisfied constitutional requirements for paying pole owners "just compensation" for mandatory attachments. *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*"). The court of appeals held:

> We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utilities'] view, constitutionally inadequate under the current Act for forced access situations. Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.

Gulf Power I, 187 F.3d at 1338.

Undeterred, in June 2000 Petitioner notified Alabama cable operators, whose attachments had been on utility poles for more than 20 years, that it intended to terminate all pole attachment agreements, deem existing attachments to be a "taking" under § 224(f), and require cable operators who wished to maintain their attachments to sign new pole agreements prepared by APCO that increased annual pole rental rates by more than 500 percent, from $7.47 to $38.81 per pole.

This convenient termination of existing attachments did not change the nature or amount of space on the poles occupied by the cable operators' attachments. It only allowed Petitioner to claim that the cable operators' continued presence on the poles was not "voluntary" so it could then argue that the compensation due was not limited to the § 224 formula and this Court's holding in *Florida Power* and instead would be governed by the Fifth Amendment and its (unfounded) hope for more compensation under *Gulf Power I*.[1]

The Alabama cable operators ("Complainants")[2] immediately filed a Pole Attachment Complaint with the Cable Services Bureau ("Bureau") of the FCC seeking a ruling that APCO's termination of existing contracts and unilateral imposition of new, exorbitant pole rates constituted violations of § 224 and the FCC's implementing regulations, 47 C.F.R. §§ 1.1401-1.1418. The Bureau granted the Complaint and rejected APCO's proposed new rate. Pet. App. 87a-96a. The full Commission affirmed the Bureau. Pet. App. 25a-86a. APCO sought review in the Eleventh Circuit, arguing that it was entitled to the rate of $38.81 as "just compensation" for mandatory attachments. In a

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[1] Petitioner was evidently encouraged by the statement in *Florida Power* that this Court was not deciding what the appropriate level of compensation might be for pole attachments "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Florida Power*, 480 U.S. at 251, n.6. Petitioner believes that § 224(f) precipitates that "future case." See Petition at 6.

[2] The principal Complainants were the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. (now Comcast Cablevision of Alabama, Inc.). In addition, the Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. filed a separate Pole Attachment Complaint at the Cable Services Bureau against Gulf Power Company, in response to Gulf Power's similar increase in annual pole rental rates by more than 500 percent to $38.06. Pet. App. 14a, n.17.

unanimous decision, the court of appeals denied APCO's petition for review. Pet. App. 1a-24a.

In its petition for certiorari here, APCO reargues that it has been denied "just compensation" by characterizing the decision below as awarding it only "the costs associated with its property being taken" and that its "utility pole space [was rendered] essentially valueless." Petition at 3. Petitioner relies on a recent dissent by Justice Scalia in an attempt to analogize this case to that which divided the Court in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). Petition, 3, 9-10, 12-15, 23, n.6, 24, 27-28. However, the majority and dissenting opinions in *Brown* are both consistent with the Eleventh Circuit's decision below. Moreover, Petitioner here receives the associated costs of attachment *and* rental for space on its poles, putting it in a better position than it was before any of its pole space was "taken" by virtue of § 224, thus giving it considerably more than the minimum required as "just compensation" under the Constitution.

This case, in which Petitioner has engineered a "taking" as a pretext for demanding a more than five-fold increase in annual pole attachment rates under the guise of "just compensation," is simply another aspect of the electric industry's continuing assault on federal regulation of pole attachments.[3] Because there was no

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[3] In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*") electric utilities sought review of the FCC's revised pole attachment rules and again argued that the cable rate formula established by the FCC under Section 224 for "mandatory" attachments did not provide just compensation. The Eleventh Circuit held that this facial attack on the FCC's regulations was not ripe. *Id.* at 1272. However, the court of appeals also held that the FCC lacked jurisdiction to regulate pole attachments that are used for cable television service commingled with Internet service or that are used for wireless communications. *Id.* at 1273-78. The latter ruling was overturned by this Court in *NCTA*, 534 U.S. at 790. In *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), the parent company

error below or inconsistency with any decision of this Court, no conflict among the circuits, or any other basis for review, APCO's Petition should be denied.

I. Utility Poles, Pole Regulation, And The Telecommunications Act Of 1996

A. Utility Poles Are Essential Facilities

In 1978, in response to evidence that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachments Act, 47 U.S.C. § 224 ("Act"). *Florida Power*, 480 U.S. at 247. In the deliberations preceding the Act, Congress observed that "[i]n many communities," "because of the lack of available rights-of-way, environmental restrictions, or zoning laws," cable operators were "unable to construct [their] own pole plant for the attachment of [their] coaxial cable" and instead were required "to use existing utility company poles." H.R. REP. NO. 94-1630, at 5 (1976). Congress further found that "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." S. REP. NO. 95-580, at 13 (1977). As this Court observed, "utilities ... ha[d] found it convenient to charge monopoly rents." *NCTA*, 534 U.S. at 330. *See also Florida Power*, 480 U.S. at 247 (utilities

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of APCO and Gulf Power argued that FCC guidelines pertaining to non-discriminatory access to poles were invalid. With two exceptions, the Eleventh Circuit upheld the guidelines as reasonable. *Id.* at 1343-53. Then, in *Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002), the utilities attacked FCC rules involving the calculation of the number of entities on a pole, the industry practice of "overlashing" one attachment with another, and the determination of conduit rental rates. With the exception of certain rules for which it held the utilities' challenges to be unripe, the D.C. Circuit upheld all of the FCC rules. *Id.*

were said to be "exploiting their monopoly position by engaging in widespread overcharging."). Thus, the 1978 Act was passed "[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unreasonable pole attachment practices on the wider development of cable television service to the public." S. REP. NO. 95-580, at 114.

B. Pole Regulation And Pole Attachment Payments

The FCC responded to Congress' mandate by developing an approach which recognizes that utilities receive two forms of compensation for pole attachments: (1) contractual payments by attachers to pole owners for the costs of modifying the poles or lines to accommodate the attachers' additional facilities, known as "make-ready" work; and (2) annual pole attachment rental rates based on the value of the entire pole and the proportional space occupied by the attachers under a formula set forth in § 224 and the Commission's rules.[4]

Utilities recover all of their out-of-pocket, or incremental costs, in the form of make-ready payments directly from cable systems. *In re Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 F.C.C.R. 6453, ¶ 7 (2000) ("*2000 Pole Order*"); *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 F.C.C.R. 4387, ¶ 4 (1987)

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[4] Under Section 224(c), states may "preempt" the FCC's authority where they certify that they regulate pole attachment rates, terms, conditions, or access to poles. Eighteen states and the District of Columbia have provided the required certification.—*See States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992). These states have for the most part adopted the FCC's methodology when setting pole attachment rates. Alabama (and Florida) have not certified, so rates for pole attachments in those states are set using the federal formula and the FCC's procedures.

("*1987 Pole Order*"), *on recon.*, 4 F.C.C.R. 468 (1989). In fact, APCO, like other electric utilities, contractually requires that attachers pay all of the costs incurred for make-ready work. *See, e.g.*, Complaint, Ex. 3, ¶ 4 (filed June 23, 2000).

Utilities also receive compensation for pole attachments through annual pole rental rates. Section 224 creates a range of compensation, the low end of which is the incremental costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment). The parameters for setting the rate for cable television attachments are set forth in 47 U.S.C. § 224(d); the parameters for setting the rates for telecommunications attachments were added in 1996 and are set forth in 47 U.S.C. § 224(e). The FCC has long interpreted the statute to provide that when it is reducing a utility's annual rate for pole attachments, it reduces it to the statutory maximum. *Florida Power*, 480 U.S. at 254.

The FCC allocates annual pole costs to cable operators through a set of presumptions and references to existing utility financial reports filed with the Federal Energy Regulatory Commission ("FERC"). The FCC's formula for cable attachments begins with the annual carrying costs for the *entire* pole—maintenance, depreciation, administrative overhead, taxes, and return on investment at the rate authorized by the applicable State Public Service Commission ("PSC"). Each cost input is taken directly from each utility's specific, publicly-reported cost information (FERC Form 1). Although the FCC publishes a schedule of the FERC accounts that are presumptively included in the cost calculation, *1987 Pole Order*, 2 F.C.C.R. at 4404, the FCC actually tailors the cost calculation to individual showings by utilities.

These costs for the whole pole are then allocated by the amount of space used by cable operators. The

formula uses presumptions, for a population of 35- and 40-foot poles, that 13.5 feet of space above minimum grade clearance is "usable" and cable attachments "use" one foot of that space. 47 C.F.R. § 1.1418. Thus, a cable attachment is assigned 1/13.5 of the annual carrying costs of the entire pole. This presumption is explicitly rebuttable. 47 C.F.R. § 1.1404(g)(1)(xi). Utilities can and do submit their actual plant records so that a utility with shorter poles (and therefore less usable space) can assign proportionately more cost to each foot of usable space.

The FCC developed this approach through a series of rulemakings and adjudicated cases. *See, e.g., In re Adoption of Rules for the Regulation of Cable Television Pole Attachments,* Notice of Proposed Rulemaking, 68 F.C.C.2d 3 (1978) ("*1978 Notice of Proposed Rulemaking*"); First Report and Order, 68 F.C.C.2d 1585 (1978) ("*First Report*"); Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59 (1979) ("*Second Report*"); Memorandum Opinion and Order, 77 F.C.C.2d 187 (1980) ("*Reconsideration*"); *Petition to Adopt Rules Concerning Usable Space on Utility Poles,* Memorandum Opinion and Order, 56 R.R.2d 707 (F.C.C. 1984). The Commission's orders promulgating its rules and policies were upheld on appeal. *See Monongahela Power Co. v. FCC,* 655 F.2d 1254 (D.C. Cir. 1981). The FCC has reconsidered and adjusted the cost accounting, *1987 Pole Order,* and recently conducted a rulemaking that led to a decision reaffirming the propriety of the annual cable attachment rental methodology, including the use of particular cost accounts and the applicability of established presumptions. *See 2000 Pole Order; see also In re Amendment of Rules and Policies Governing Pole Attachments,* Consolidated Partial Order On Reconsideration, 16 F.C.C.R. 12103 (2001).

C. The Telecommunications Act Of 1996

In the Telecommunications Act of 1996 ("1996 Act"),[5] Congress sought to promote competition while simultaneously guarding against utilities' abuse of their monopoly control over poles. Congress expanded the 1978 Act to include *all* competitive cable and telecommunications carriers and granted them a right of pole access upon payment of just and reasonable compensation.[6] In the 1996 Act, Congress also amended federal law to allow interstate electric utilities into the field of telecommunications under rules ensuring fair competition, Pub. L. No. 104-104, § 103, and required them to provide non-discriminatory access to poles and other rights-of-way. See 47 U.S.C. § 224(f). Utility adherence to the rules ensuring fair competition was the "quid pro quo" for allowing the utilities into communications businesses that had been previously forbidden. Pub. L. No. 104-104, § 103 (amending the Public Utility Holding Company Act, 15 U.S.C. § 79); *see also* Pet. App. 8a ("Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory") (citation omitted).

Taking advantage of their new freedom, the utilities have created subsidiaries and affiliates that lease fiber-optic lines, provide communications services, and offer Internet and long distance services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 F.C.C.R. 4358, ¶¶ 4, 10, 95-98 (1997). Petitioner's parent company, the

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[5] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[6] *Id.*, Sections 224(f), 251(b)(4) (codified at 47 U.S.C. §§ 224(f), 251(b)(4)). Incumbent local exchange carriers (phone companies) also own poles and are subject to the FCC's pole attachment regulations when they lease space to cable operators or telecommunications carriers, but cannot demand access themselves when renting space from other utilities. 47 U.S.C. § 224(a)(5).

Southern Company, now provides telecommunications and other services through various subsidiaries. *In re Application of Southern Telecom Holding Co., et al.*, DA 96-952, FCC File Nos. ETC-96-8; ETC 96-9; ETC-96-10 (June 14, 1996).[7]

II. The Decisions Of The Bureau And The Commission

After considering the cable operators' pole attachment Complaint, APCO's Response, and the cable operators' Reply, the Bureau issued an Order on September 8, 2000 granting the Complaint. *In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*, Order, 15 F.C.C.R. 17346 (2000) ("*Bureau Order*"), Pet. App. 87a-96a. The Bureau rejected APCO's contention that the cable formula did not provide just compensation, finding instead that APCO was fully compensated for any make-ready or change-out costs associated with the attachments and that the annual pole attachment rate allowed it a full recovery of the costs associated with the space used for the attachment as well as a return on capital. Pet. App. 93a-94a. APCO immediately filed an Application for Review with the full Commission.[8]

On May 25, 2001, the Commission denied APCO's Application for Review. *In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*,

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[7] *See also* http://www.southern-telecom.com (last visited July 2, 2003); *see generally* John Markoff & Matt Richtel, *Technology; Internet Via The Power Grid: New Interest In Obvious Idea*, N.Y. Times, Apr. 10, 2003, at C7, *available at* http://www.nytimes.com/2003 /04/10 /technology/10POWE.html (describing effort to provide Internet services via the power grid).

[8] APCO actually filed its Petition for Review in the Eleventh Circuit while its Application for Review was pending before the full Commission. The court of appeals noted that the Petition was "incurably premature" and dismissed it, but resolved the consolidated Petition that APCO filed after the full Commission released its order affirming the Bureau. Pet. App. 13a-14a.

Order, 16 F.C.C.R. 12209 (2001) ("*Order*"). The Commission found that its pole attachment regulations provided constitutionally sufficient compensation because they enabled APCO, a utility, "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . . ." Pet. App. 62a (citations omitted). Second, the Commission ruled that APCO had not provided credible evidence that the payment of make-ready and annual rents under the cable formula failed to place APCO in the same position monetarily as it would have been but for the cable operators' attachments. Pet. App. 72a-73a. "The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation." Pet. App. 72a.

III. The Court Of Appeals' Decision

The Eleventh Circuit dismissed APCO's Petition for Review of the Commission's *Order*. Pet. App. 1a-24a. The court agreed with the Commission's application of the established legal principle that just compensation is measured by the loss to the owner and held that, because FCC regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, APCO received more than just compensation. Pet. App. 21a. If, and only if, APCO had made a factual showing (which it never attempted) that its poles were "full" would APCO be in a position to demand something more than marginal cost. *Id.*[9] On January 8, 2003, the court of appeals denied APCO's petition for rehearing and suggestion for rehearing en banc. Pet. App. 98a-99a.

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[9] APCO has disclaimed any interest in making such proof, deeming the court of appeals' holding on this issue "abstract." Petition, 25.

REASONS FOR DENYING CERTIORARI

Petitioner's principal argument for the granting of certiorari—that the court of appeals "depart[ed] from this court's well-defined body of takings law"—is unfounded. Petition, 12. It is based upon the incorrect application of the concept of "market value" to monopoly-controlled utility poles; a mischaracterization of the decision below as having "invented" a "zero value" standard for compensation; and inapposite comparisons to takings decisions of this Court involving real property. In fact, the court of appeals, like the FCC, correctly applied the fundamental rule of determining just compensation—that compensation due is measured by the loss to the owner, not the gain to the "taker." Pet. App. 17a-18a. As will be shown below, there was no error committed by the FCC or the Eleventh Circuit; there are no conflicts with decisions of this court or among the circuits; and there is no harm to the electric utilities from the decision being challenged because they can recover all of their costs and even earn a profit—thus being placed in a position that is better than what the Constitution requires.[10] Certainly, nothing in the Petition justifies any further review of Petitioner's claims.

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[10] *Amici Curiae* United Telecom Council, *et al.*, suggest that the Court should grant the Petition to decide issues not relevant to the Petitioner's claims, such as pole attachment rates for non-distribution utility property (transmission poles) and wireless attachments. *Amici Curiae* Br. 4-6. However, most transmission poles have been excluded from the mandatory attachment provisions. *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002). *Amici* also argue that there will be "nationwide irreparable harm," *Amici Curiae* Br. 17-19, as a result of the decision below even though the utilities recover all their costs and earn a profit on all pole attachments, and have been earning these same rates and profits on voluntary attachments for 25 years with no apparent adverse effect. *Amici*'s pleas do not warrant review.

I. Just Compensation Is Measured By The Loss To The Property Owner

More than 100 years ago, this Court established that the constitutional measure of just compensation is the loss to the person whose property is taken. *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987); *United States v. Causby*, 328 U.S. 256, 261 (1946); Pet. App. 17a-18a. Petitioner never even mentions this principle—let alone addresses it—in its Petition. Instead, Petitioner invokes the talismanic phrase "market value" as purported justification for its five-fold annual pole rent increase. But "market value" does not apply in circumstances where there is no "market." Instead, the general, governing standard for determining just compensation is "loss to the owner." *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948).

The Constitution does not prescribe a fixed method for the calculation of just compensation and the Court "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). Instead, there are several approaches that may be applied. Frequently, the courts will determine just compensation by looking to "fair market value." This denotes "what 'it fairly may be believed that a purchaser in fair market conditions would have given'" for the property at issue. *United States v. Miller*, 317 U.S. 369, 374 (1942) (internal citation omitted). However, "[w]here, for any reason, property has no market, resort must be had to other data to ascertain its value ...." *Id.*

A second approach to calculating just compensation involves assessing the income that an asset is expected to produce. This approach is based on the concept that a prospective buyer "will be willing to pay a price for an

asset that reflects a present value of the future benefits (*i.e.*, income) that the buyer can realize from the asset." JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN, § 14A.06[3][b] (3rd ed. 1998) ("NICHOLS"). The third approach that may be appropriate to determine just compensation is an evaluation of the costs of the property at issue. NICHOLS, § 14.06[2]. Which of the three approaches is appropriate to use in a particular case will depend "upon the circumstances of each case." *Miller*, 317 U.S. at 373-74. Thus, the concept of "market value" does not necessarily apply in all instances, and, in any particular case, the approach selected to calculate just compensation in the event of a taking should focus only on putting the owner in "as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* at 373.

II. Petitioner Receives More Than Just Compensation By Virtue Of Make-Ready Payments And An Annual Pole Rent

APCO is compensated for the "loss" associated with allowing cable operators to attach facilities to its poles in two ways: "make-ready" payments and annual pole rents. Petitioner contends here that make-ready is irrelevant to a determination of just compensation for attachers' use of its utility poles. Petition, 23-24. APCO alleges that make-ready represents "nothing more than reimbursement for the actual expenditures incurred by" it. Petition, 23-24. However, just compensation requires that a property owner be "put in as good position pecuniarily as he would have occupied if his property had not been taken." *Miller*, 317 U.S. at 373. Make-ready payments meet this requirement directly by compensating pole owners for all of the actual costs caused by an attachment. In this case, the record establishes, and the court of appeals properly observed, that Alabama's cable operators pay APCO make-ready

payments of more than $1 million *per year.* APCO Response, Tab 1, Item 13 (filed July 14, 2000).

Petitioner also contends that make-ready payments do not compensate it for the "value of the space" occupied by an attachment. Petition, 24. But APCO has never even attempted to show that it experienced any "loss" from cable operators' use of one foot of pole space for their attachments beyond make-ready costs. Pet. App. 19a-21a. Indeed, cable operators' attachments do not deny APCO, or other attaching parties, the use of the pole. Cable operators attach their wires only to space that is not being used. If existing communications space is insufficient or limited, cable operators pay the cost of make-ready or pole "change-out" to cover the costs of strengthening existing poles or substituting larger poles. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 F.C.C.R. 18049 at ¶21 and n.50 (1999).

In any event, Petitioner is wrong. It is compensated for the "value" of the space occupied. Petitioner actually receives, *in addition to* make-ready, an annual pole rental for cable attachments that is determined by multiplying the percentage of the total usable space that is occupied by the attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. 47 U.S.C. § 224(d)(1). This annual rental then provides APCO a portion of the fully allocated cost of the construction and operation of the pole to which cable is attached based on the space used. Pet. App. 6a, n.7 (citing *Florida Power*, 480 U.S. at 253). Significantly, these "fully allocated costs" include components for the utility's administrative, maintenance, depreciation expenses, income taxes, *and* a return on investment (profit). *See* 16 F.C.C.R. 12103 at ¶ 28 (2001). The substantial amount of compensation APCO receives through both make-ready *and* annual rent

thus entirely vitiates its claim, Petition, 3, 13, that the court of appeals adopted or "invented" a "zero value" standard for just compensation. [11]

In evaluating whether the payment to Petitioner of this combination of make-ready payments and the annual pole rental satisfies the requirement of just compensation, the court of appeals properly considered first the nature of the utility's property. Pet. App. 3a-4a; *Miller*, 317 U.S. at 373-74. Utility poles are highly regulated, monopoly-controlled, essential facilities. Pet. App. 3a-4a, 69a-70a; *NCTA*, 534 U.S. at 340 (poles are "bottleneck facilit[ies]" for which utilities have "found it convenient to charge monopoly [pole] rents."); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (cable operators have "little choice but to" attach to utility poles). [12]

Then the court of appeals correctly examined the nature of the property interest being "taken"—space on a utility pole—to determine what "loss" to the pole owner, if any, an attaching party caused. Pet. App. 17a-18a. A cable operator's use of a portion of a utility pole does not "foreclose any other use" of the pole. Pet. App. 19a.[13] APCO's monetary "loss" for purposes of determining the

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[11] In addition to the more than $1 million in annual make-ready payments paid to Petitioner in 1999, APCO Response, Tab 1, Item 13 (filed July 14, 2000), Alabama cable operators paid Petitioner an annual aggregate pole rental of more than $2.3 million (310,443 poles x $7.47 annual rental rate). *See* Cable Operator Complainants' Second Supplement, Ex. 2 (filed Sept. 6, 2000); Complaint, Ex. 4 (filed June 23, 2000). These additional payments could hardly be characterized as representing a "zero value."

[12] Notably, the decisions relied upon by APCO, *see* Petition, 12-13, all involve real estate or other liquid assets such as cash, not partial interests in regulated, "bottleneck" facilities.

[13] The court of appeals used the term "nonrivalrous" to explain that, because of the "unique" nature of fractional space on a utility pole, the "use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a-19a.

level of just compensation required by the Constitution, is therefore limited to its actual incremental, or marginal, costs; Petitioner receives "much more than" this amount through the combination of make-ready and annual payments pursuant to the FCC's cable rate formula. Pet. App. 18a.

Petitioner's basic challenge to these time-honored concepts is that its poles should be analogized to privately owned real estate and that it is entitled to charge an annual rent based upon what *it* deems fair "market" value to be. Petition, 12-13, 17-18.[14] Fundamentally, this amounts to a claim that attaching parties pay rates based upon the savings that attaching parties obtain by not having to reproduce, or build anew, a second *system* of utility poles. *See* Petition, 12, 17. Such a measure, whether labeled monopoly rent, "retention" value, or "hold-up" value, is inconsistent with the bedrock principle of measuring just compensation by loss to the owner. In *Commodities Trading Corp.*, 339 U.S. at 123-28, the Court held that "fair and equitable" ceiling prices set by the government in wartime were the measure of just compensation for requisitioned pepper without any regard to higher peacetime "market" value if the requisitioned pepper could have been held and sold later to private parties. In *Lord Mfg. Co. v. United States*, 114 Ct. Cl. 199, 269 (1949), *cert. denied*, 339 U.S. 956 (1950) the Court of Claims held that the "list price" for which the plaintiff's engine mountings could have been sold was not the measure of "just compensation" for the forced sale of those mountings to the government.

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[14] Petitioner argued to the FCC that its five-fold increase in pole rent to $38.81 per pole was justified under three methodologies: market comparisons, income capitalization, or replacement costs. Pet. App. 69a-71a. The FCC soundly rejected these arguments as did the court of appeals, finding the application of such methodologies to be inconsistent with the legal principle that just compensation is determined by the loss to the owner. Pet. App. 68a-73a; 15a, n.19, and 16a-17a. Petitioner has largely abandoned those arguments here.

These concepts carried forward to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the decision upon which the earlier *Gulf Power I* courts relied for the conclusion that the mandatory access provisions in § 224 constituted a taking of property. In *Loretto*, there was never any consideration that some sort of "value to the taker" standard applied to require a higher rate of compensation than was set by New York's mandatory access law (the rate prescribed was $1). This Court noted that any pre-existing indication of "market value" measured by the voluntary payment Teleprompter made to Ms. Loretto before the advent of the mandatory access law that was substantially in excess of the statutory presumptive payment was *not* evidence of what "just compensation" would be for a taking. *Loretto*, 458 U.S. at 441. Instead, the Court left it to the New York courts to decide the issue. *Id.*[15]

In addition, this Court has repeatedly stated that "market value" is not an appropriate method for calculating just compensation "'when market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public.'" *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Commodities Trading*, 339 U.S. at 123, *Kirby Forest Inds., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)). The court of appeals' finding that there is no "active, unregulated market for the use of 'elevated communications corridors...,'" Pet. App. 16a, is consistent with both Petitioner's own concession below that there is no unregulated market for poles, *see* APCO

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[15] Indeed, a level of compensation based on the amount of prior payments or the "market" value to the cable company of placing its facilities over Jean Loretto's roof was never accepted by any court. *See, e.g., Loretto v. Group W. Cable*, 135 A.D.2d 444, 448, (N.Y. App. Div. 1987) (likely award of one dollar), *appeal denied*, 522 N.E.2d 1066 (N.Y. 1988) (Table), *cert. denied*, 488 U.S. 827 (1988).

Reply Brief, 23-24 (filed May 18, 2001), and with this Court's recent conclusion that utility poles are "bottleneck facilities" subject to the "monopoly" control of their owners. *NCTA*, 534 U.S. at 330, 340.

The court of appeals' decision is also supported by *Metropolitan Transportation Authority v. Interstate Commerce Comm'n*, 792 F.2d 287 (2d Cir. 1986) ("MTA"). In MTA, a case involving the government's requiring one regulated entity to share its facilities with another regulated entity, the Second Circuit reasoned:

> [A]ssuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking. * * * In other words, the owner, here the lessee, of the railroad facilities will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. * * * If the Fifth Amendment required such a sharing of the overhead costs of ownership, then the petitioners would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation it is that value to the taker is not to be considered; only loss to the owner is to be valued.

Id. at 296-98. In its Petition, 15, APCO argues that MTA's discussion of the issues is inapposite, but in fact the Second Circuit's reasoning is directly relevant—it considers the appropriate measure of just compensation for the physical use by one party of another party's regulated property. By comparison to MTA, the pole attachment payments here ensure that APCO actually

does receive a proportionate share of its overhead (and all its other costs). Pet. App. 63a-64a. Because APCO receives both its marginal costs of an attachment through make-ready payments as well as the proportionate share of its operating costs attributable to an attachment through annual rental payments, Petitioner receives more than just compensation for pole attachments. Pet. App. 17a, 21a.

Petitioner's reliance upon the dissent in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), Petition, 9-13, is misplaced. In *Brown*, the Court held that because the net pecuniary loss to owners of monies deposited in lawyers' trust accounts was zero, the Washington state law did not violate the Fifth Amendment. *Id.* at 1419-21. The dissenters reasoned that the Washington law violated the Fifth Amendment and that compensation equivalent to accrued interest was owed to the monies' owners. *Id.* at 1422-28 (Scalia, Kennedy, JJ., dissenting). The dissenters, like the majority in *Brown*, adhered to the basic principle that just compensation is measured by an owner's loss. *Id.* at 1427 (Scalia, J., dissenting). The dissenters would have held that the owners' of monies were entitled to receive the actual interest their funds earned. But, in the case of pole attachments, the FCC regulations ensure that the pole owner, Petitioner, receives its actual costs attributable to an attachment, both out-of-pocket costs and ongoing annual costs, *plus* an allocation for cost of capital, or profit. Pet. App. 63a-64a. Therefore, even under the dissent in *Brown*—which acknowledged that a "market value" standard is not to be applied when it is "too difficult to ascertain" or when it would result in "manifest injustice" to the owner or the public—there is no basis for further review of the decision below. *Brown*, 123 S. Ct. at 1423 (citation omitted).

In its Petition, APCO nonetheless argues that the court of appeals' decision was erroneous because it did

not consider the "constitutional significan[ce]" of the FCC's rate for telecommunications pole attachments, or "Telecom Rate," Petition, 15-16; it did not recognize that APCO's pole space for communications attachments is "finite" and "crowded," Petition, 24-25; and it ignored the "reality" that APCO has "lost opportunities," Petition, 25-27. None of these arguments has merit.

First, the potential difference between the rate for cable television attachments and the rate for telecommunications attachments has no constitutional significance because, under FCC regulations and utility contract practices, the pole owner is paid all of its marginal costs through make-ready, in addition to the particular annual pole rental fees. As the court of appeals explained, because payment of marginal cost provides just compensation to pole owners for the use of pole space absent a specific factual showing of the loss of a higher valued use, it is "irrelevant" for constitutional purposes that the formula set forth in 47 U.S.C. § 224(e) may yield a higher rate for telecommunications attachments than the formula set forth in 47 U.S.C. § 224(d) for cable attachments. Pet. App. 21a. Moreover, because a new attacher will pay the make-ready costs of adding its attachment to poles, and create additional space through the change-out of larger poles if necessary, Pet. App. 71a-73a, Petitioner's suggestion that it may be deprived of the opportunity to charge other attachers a higher rate for telecommunications attachments, Petition, 16, is without basis.

Second, Petitioner's argument that space on its utility poles is "finite and indeed crowded," Petition, 25, is unsupported by the record. Petitioner alleges that, on average, its poles will support only one cable or non-incumbent telecommunications attachment. Petition, 24. But, this allegation was devoid of any support in the

record.[16] In fact, the record shows that, on a typical 40-foot utility pole, there is more space available than APCO claims in its Petition. *Compare* Pet. App. 74a (discussing APCO's failure to rebut the presumption that a 40-foot pole has 13.5 feet of usable space) *with* Petition, 24 (alleging only 10.5 feet of usable space). Moreover, even if Petitioner could have established that certain of its poles have a finite amount of space, the industry practice, as noted above, is for a new attacher to create additional space through the make-ready process.

Third, Petitioner's arguments that it has constitutionally cognizable "lost opportunities" are also without foundation. As discussed earlier, because there is no "market" for Petitioner's "bottleneck facilities," Petitioner's contention that the FCC's pole rates wrongfully deprive it of a purported constitutional right to charge "market" rates is a non-starter. This is merely a demand to charge monopoly rents, something this Court and others have held is not required by the Fifth Amendment. *See Commodities Trading*, 399 U.S. at 128; *Lord Manufacturing*, 114 Ct. Cl. at 269. Petitioner's claimed right to sell pole space "at an unregulated rate to a non-cable or non-telecom business," Petition, 26, was never made, let alone proven, in the record below.

Finally, APCO's argument that it has lost the opportunity to deny all third party attachments and only allow its own affiliated providers to attach has nothing to do with determining what level of compensation is just.

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[16] The court of appeals observed that, if APCO could show that its utility poles were at capacity and that another entity was prepared to pay APCO compensation exceeding that required of Cable Operators under FCC regulations, APCO might be able to claim a constitutional right to greater compensation. Pet. App. 20a-21a. However, "nowhere in the record did APCO allege that APCO's network of poles is currently crowded." Pet. App. 20a. Because Petitioner did not even allege such facts, let alone provide proof of such a lost opportunity, it "had no claim" for any additional compensation beyond reimbursement for its marginal costs. Pet. App. 20a-21a.

Rather, it is an example of the leveraging of monopoly control by pole owners that motivated Congress to expand Section 224 to cover telecommunications services providers. *See* 47 U.S.C. § 224(e); CONF. REP. S. 652, 142 CONG. REC. H. 1078, at *H 1133-34 (Jan. 31, 1996).

III. The FCC's Procedures For Determining Compensation For Pole Attachments Are Constitutional

Petitioner also challenges the procedural fairness of both the FCC's and the court of appeals' review of its just compensation claim. Petition, 18-20. First, Petitioner argues that, under *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), Congress impermissibly created a taking under Section 224(f) and wrongfully specified how the Commission could calculate the pole owner's just compensation under Section 224(d). Second, Petitioner attacks the court of appeals' conclusion that APCO's challenge to the FCC's methodology did not warrant an evidentiary hearing. As demonstrated below, these arguments are without merit.

Petitioner's contention that the FCC may not initially evaluate its just compensation claim is incorrect. In a prior case brought by Petitioner's affiliate, Gulf Power, the court of appeals found that Section 224 and the governing provisions for judicial review provide a reasonable, adequate, and certain process for paying just compensation retroactively to the time of any taking attributable to a pole attachment. *Gulf Power I*, 187 F.3d at 1337. In particular, the court of appeals in *Gulf Power I* determined that an executive agency may make an initial determination of just compensation so long as there is a right of judicial review. *Id.*; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Dow*, 357 U.S. 17, 21 (1958); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); *Wisconsin Central Ltd. v. Public*

Service Comm'n, 95 F.3d 1359 (7th Cir. 1996). The fact that Congress established the general terms for a formula for providing for cost reimbursement and a rental payment does not deprive a reviewing court of its constitutional power to review an administrative order setting a just compensation payment.[17]

The court of appeals in *Gulf Power I* found that the FCC's initial determination does not render the process constitutionally inadequate because "an appellate court has at least five means at its disposal to gather the information needed to determine just compensation, and those means are sufficient to provide a utility with a full and fair opportunity to submit for judicial consideration all relevant evidence ...." *Gulf Power I*, 187 F.3d at 1334. The court of appeals specified that the reviewing court may: (1) rely on the evidence submitted in the record before the Commission; (2) remand and direct the Commission to supplement the record if it finds that the record before the Commission is inadequate; (3) transfer the case to a district court and direct it to hold a full hearing pursuant to 28 U.S.C. § 2347(b)(3); (4) appoint a special master under F.R.A.P. 48 to hold a hearing and obtain additional information necessary for the court to

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[17] Indeed, this Court previously addressed and rejected the very argument raised by Petitioner on this point, explaining that:

> The claim is also made that ... the legislature cannot specify the form of compensation but must leave the decision to the judiciary. This argument is based upon an erroneous reading of *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893). *Monongahela* held only that the legislature could not, by setting either a fixed amount to be paid for property condemned or a principle for arriving at that amount, settle the constitutional right to just compensation. Thus, *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 151 n.39 (1974).

determine the just compensation issue; or (5) devise other proper "mode[s] of procedure" vital to achieve its fact-finding pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. *Id.* at 1334-35 (citations and internal quotations omitted) (footnote omitted). Significantly, Petitioner never asked the court of appeals to do any of the enumerated items above nor did any utility ask this Court to review the propriety of *Gulf Power I's* conclusions.

APCO's second procedural argument—that it was wrongly deprived of due process, including a "full hearing" on its claim for just compensation—is also unfounded. Petition, 19-20. APCO cannot credibly claim that it has been denied the due process elements of notice and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 54[illegible] (1985) (stating that "the opportunity to present reasons, either in person *or in writing* why proposed action should not be taken is a fundamental due process requirement") (emphasis added). This Court has also recognized that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances;" rather "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard, . . . to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge,* 424 U.S. 319, 348-49 (1976) (quoting *Goldberg v. Kelly,* 397 U.S. 254, 268-69 (1970) (footnote omitted)).[18]

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[18] The authorities relied upon by Petitioner are inapposite. *Walker v. Hutchinson,* 352 U.S. 112 (1956), addressed the narrow issue of sufficient notice effected by newspaper publication pursuant to statute. *Bailey v. Anderson,* 326 U.S. 203 (1945), required only that the owner have an opportunity to be heard and to offer evidence concerning the property's value. In *Bragg v. Weaver,* 251 U.S. 57, 59

The FCC's rules governing pole attachment complaint proceedings comport with the due process requirements of the Fifth Amendment by providing parties with notice and the opportunity to be heard through a specific pleading process with the opportunity to submit evidence, declarations, expert reports and statistical data. *See* 47 C.F.R. §§ 1.16, 1.363, 1.1401-1.1418. These procedures implement Congress's mandate to provide an expeditious resolution to proceedings involving pole attachment complaints.[19] The Commission's pole attachment regulations are also flexible, and the FCC "may decide each complaint upon the filings and information before it ... or *may, in its discretion*, order evidentiary procedures upon any issues it finds to have been raised by the filings." 47 C.F.R. § 1.1411 (emphasis added).[20] Moreover, an administrative litigant is not automatically entitled to a hearing; rather the litigant must properly articulate a valid legal theory and adduce sufficient facts that warrant such a hearing. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956) (noting that broadcast applicants seeking a waiver from a limitation on a station ownership under 47 U.S.C. § 309 must "state a valid basis for a hearing.").

In this case, APCO's dispute was "only over the *methodology* that should be used to calculate the level of

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(1919), this Court explained that having a full trial was merely one of "several admissible modes" of determining just compensation.

[19] 47 U.S.C. § 224(b)(1); 47 C.F.R. §§ 1.1404-1.1418; *see also* Pet. App. 91a-92a. In enacting the Pole Attachments Act, Congress expressly stated its intention to avoid a lengthy, full-blown rate case for each dispute. S. REP. NO. 95-580, at 19-20 (1977), *Florida Power*, 480 U.S. at 247-48; *In re Amendment of Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, ¶¶ 7-8 (2001).

[20] This Court has affirmed the propriety of deference to an agency's establishment of internal procedural regulations, as long as those regulations comport with due process obligations. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

just compensation—a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed." Pet. App. 24a (emphasis in original; citations omitted). Accordingly, APCO's due process challenge to the FCC's pole attachment complaint procedures is entirely without merit. *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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July 9, 2003

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